UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

URBAN HOMESTEADING ASSISTANCE BOARD STERLING STREET HOUSING DEVELOPMENT FUND CORPORATION AND DEL-MAR MANAGEMENT SERVICES, INC., Joint Employers

and Case No. 29-CA-29122

DENNIS DUPREE, An Individual

Brent Childerhose, Esq. for the General Counsel.
Joel Cohen, Esq., Katherine D. Kale, Esq. & Emilie
A. Hendee, Esq. (McDermott Will & Emery
LLP), of New York, NY for the Respondents.

DECISION

Statement of the Case

Steven Fish, Administrative Law Judge: Pursuant to charges filed by Dennis Dupree, herein called Dupree, an individual, on August 7, 2008¹ the Director for Region 29 issued a Complaint and Notice of Hearing on November 26, alleging that Urban Homesteading Assistance Board Sterling Street Housing Development Fund Corporation, herein called Respondent UHAB or UHAB and Del-Mar Management Services, Inc., herein called Respondent Del-Mar or Del-Mar, and collectively called Respondents, violated Section 8 (a)(1) and (3) of the Act by refusing to hire Dupree and Roger Tribble, herein called Tribble, because Dupree and Tribble joined, supported or assisted Local 32BJ, Service Employees International Union, herein called the Union.

The trial with respect to the allegations in the above complaint was held before me in Brooklyn, New York on February 11, 12 and 23, 2009. Briefs have been filed and have been carefully considered.

Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

Findings of Facts

I. Jurisdiction

Respondent UHAB is a corporation, engaged in the operation of a fund, which exists for the purpose of *inter alia* converting low income housing into cooperatives.

¹ All dates are in 2008, unless otherwise indicated.

Respondent Del-Mar is also a corporation, which is engaged in the management of various residential apartment buildings, including one located at 320 Sterling Street, Brooklyn, NY, herein called the Sterling Street facility.

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Respondent Del-Mar has possessed and exercised control over the labor relations policies of Respondent UHAB, administering a common labor policy for the employees employed at the Sterling Street facility.

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It is admitted and I so find that Respondents have been joint employers of employees at the Sterling Street facility.

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Respondents in the course and conduct of their business operations derived gross revenues in excess of \$500,000, and purchased and received goods, products and materials valued in excess of \$5000 from firms within the State of New York, which in turn, purchased and received said goods, products and materials from points outside the State of New York.

It is admitted and I so find that Respondents have been, at all times, employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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II. Facts

A. Background

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The Sterling Street facility had been owned by the New York City Housing Preservation and Development (HPD), which is a municipal developer of affordable housing. HPD was the employer of the employees at the facility although they were paid with checks by a payroll agency, Penda Aiken, Inc.

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In 2006, HPD contracted with Respondent UHAB² to facilitate the conversion of the building to an affordable cooperative by transforming tenants into homeowners, who collectively own and govern their own housing. At that time, Respondent UHAB was a lessee of the property and it was responsible for supervising the renovation, organizing the conversion, securing financing and training the residents on how to run a cooperative.

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Respondent Del-Mar was contracted by the HPD to manage the building earlier in 2006.³ Respondent Del-Mar continued in that capacity after Respondent UHAB began its involvement in the building. The transition process contemplated that the ownership of the building (including the supervision of the employees) would be transferred to Respondents sometime in 2008. The process also contemplated that Respondents will "own" the property far only two years, after which the conversion will be effectuated and the units sold to the tenants for \$250 per apartment.

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The ownership of the building, pursuant to the above detailed process, was transferred to Respondent UHAB on July 10, 2008.

² Respondent UHAB is actually a joint venture between the New York Housing Partnership and the Urban Homesteading Assistance Board.

³ Previous to that date, HPD had managed and operated the building, including supervising the employees.

In August 2007, Romulo Samaniego became the property manager for Del-Mar at the Sterling Street facility. The employees reported to Samaniego, as well as to Casey Del Valle, Respondent Del-Mar's assistant property manager.

Marina Metalios has been the project manager for Respondent UHAB since April 2008. Personnel decisions for the building are made by the joint venture and implemented by Respondent Del-Mar. Metalios interacts with a number of board members of Respondent UHAB, including Beth Berns, who works for the New York Housing Partnership, which is, as noted, part of the joint venture.

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B. The Discriminatees' Employment

Both Dupree and Tribble began their employment at the building in 2002. Dupree was the superintendent and Tribble was the porter. Dupree, as superintendent, was provided an apartment as part of his employment.

Dupree and Tribble were members of the Union for about seven years. The Union had been recognized by HPD as the representative of the employees at the facility. Union dues were deducted from their salaries and transmitted to the Union. The record does not reflect whether there was a signed contract in effect between the Union and HPD.

C. The Discriminatees' Complaints to the Union

HPD also employed as a porter, Ronald Maxwell. However, he passed away in 2007, and HPD did not replace him, which resulted in an increased workload for Dupree and Tribble. Samaniego, on behalf of Respondent Del-Mar and Respondent UHAB, recommended to HPD that a replacement for Maxwell be hired, but was informed by HPD that the city did not want to pay for a new porter. The HPD representative added that there was no money in HPD's budget to add a new employee, and further that HPD was in the process of transferring ownership to the new owners (Respondent UHAB).

On March 27, 2008, Tribble and Dupree went to the Union office and filed identical grievances alleging that "the employer has imposed an unauthorized 1 body reduction in force" on December 11, 2007. The employer named in the grievance was Penda Aiken, which as noted above, was the payroll service used by HPD, who was the employer of both employees in March 2008. No evidence was adduced that Respondents became aware of this grievance. In fact, Samaniego denied becoming aware of the grievance or that the employees had complained to the Union about the failure to hire another porter.⁴

About a month after the grievances were filed, Dupree contacted Corrado Meola, a representative of the Union. Meola told Dupree that he was still negotiating with HPD, and he would let Dupree know. Subsequently, Meola informed Dupree that HPD had agreed to compensate Dupree and Tribble two weeks pay each for the extra work they were performing, but would not agree to hire another porter. Dupree rejected the agreement on behalf of himself and Tribble. The employees did not receive the two weeks pay at that time. However, after they were terminated and not rehired, as will be detailed below, they did receive the two weeks pay sometime in August 2008.

⁴ As I have detailed above, Respondents through Samaniego requested HPD to hire a new porter but HPD refused to do so.

On March 27, 2008, Dupree received a written warning from Samaniego entitled "Unauthorized Absence." The memo deals with events that occurred on March 2 and 3. It reflects that Dupree was seen by residents on Sunday, March 2, taken away by the police, and that Dupree neither came to work on Monday, March 3, nor called to inform Respondents of his absence. The letter goes on to say that the property management and the HPD office need to know when such incidents occur, and adds that "this type of behavior is not acceptable and this memo is a formal warning regarding the March 3, 2008 unauthorized absence."

According to Dupree, he was arrested and jailed on Sunday, March 2 based on an accusation from his wife that he had assaulted her. Dupree testified that he called the building on Monday, March 3, and spoke to Del Valle, who was at the facility at the time. Dupree claims that he explained to Del Valle what had happened to him. He asserts that she offered to give him some money to bail him out. He alleges that he told her that was it okay, and that Tribble would get some money to bail him out.

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Del Valle recalls the conversation with Dupree on March 3, but states that Dupree did not call until 2:30-3:00 p.m. although his work day was to start at 8:00 a.m. According, to Del Valle, Dupree told her that he was in jail, and that he needed money for bail. Del Valle responded that she didn't have any money to give him. Dupree then told her not to worry about it, and that Tribble would take care of it. Del Valle then asserts that she asked Dupree why he didn't call earlier and let anyone know that he was not coming to work. Dupree allegedly responded that he had tried, but did not specify how and when he had previously attempted to notify anyone.

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On April 22, Dupree wrote a letter to Samaniego, apologizing for not calling the office on March 2, and stating that "upon my release I immediately called and spoke to Mrs. Casey." The letter then requests that Samaniego rescind the warning letter because he had never received a warning before. According to Dupree, this letter was written for him by and at the suggestion of Ramona Frazier, his former supervisor at HPD. Dupree asserts that Frazier must have made an error by writing that he had called Del Valle after he was released.

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Dupree testified further that after receiving the memo from Respondent Del-Mar, he asked Samaniego why he had received it since he had spoken to Del Valle, and Del Valle was aware of what happened to him. Dupree claims that Samaniego replied, "oh, don't worry about the memo. It was just a procedure."

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Samaniego issued two identical warning letters to Dupree dated March 30 and April 1, referring to an incident on March 18. The warnings reflect that Dupree did not make himself available when the fuel delivery man came to the building, and that after being asked by the security guard to open the front gate, Dupree informed the security guard that he did not start work until 8:00 a.m.

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The warning further asserts that Zoolie Rolan⁷ of Respondent UHAB "was at the building and was concerned that you told the security guard that you were not available. You must always be available and on site when fuel is being delivered to 320 Sterling Street. It is unacceptable that you cannot be present when the fuel is being delivered to the building. This letter is a warning and should this happen again, it could be grounds for termination."

⁵ Dupree did not testify as to what time on March 3 he called and spoke to Del Valle.

⁶ Samaniego did not deny this alleged conversation.

⁷ Rolan was Metalios' predecessor as property manager of Respondent UHAB.

Dupree testified that it was not necessary for him to be available when the oilman makes his delivery. According to Dupree, the security guard normally lets the oilman in, and his only involvement is to accept a receipt from the oilman. However, according to Samaniego, Del Valle and Metalios, it is Dupree's responsibility to be present when the oilman comes to make a delivery, and that it is not the responsibility of the security guard to open the gate since the security guard would need to leave the lobby desk in order to open the gate. Notably, Dupree did not deny the allegation in the warning letters that he informed the security guard that he (Dupree) did not start work until 8:00 a.m.

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Dupree also testified that after receiving these warning letters, he spoke to Samaniego about them. According to Dupree, Samaniego told him not to worry about the letters, and "I made a mistake."

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According to Samaniego, prior to issuing these warning letters, he received a complaint from Rolan, who was at the building on the day of the incident, and was concerned that Dupree had informed the security guard that he was not available. Rolan had suggested that Samaniego issue a warning letter to Dupree.

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Samaniego further asserts that he spoke to Dupree about the incident and asked him why he was not available on the day. Dupree replied that the oilman usually does not need him. Samaniego contends that he told Dupree that they needed him that day, and that Dupree should have gone downstairs to facilitate the delivery of the fuel.

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On April 4, Dupree prepared a letter to bring to the Union. The letter asserts that Del-Mar has been harassing him since Del-Mar has been on the site and that "now they are trying to put a paper trail on me." He referred to the warnings described above, and set forth his positions concerning both of these documents, i.e. that he had notified Respondents on Monday that he was in jail and that it was not necessary for him to be present when the oilman makes a delivery. Notably, this document did not assert, as Dupree testified here, that Samaniego told him not to worry about these warnings or that the last warnings were "a mistake."

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Dupree contends that he went to the Union and spoke with Meola about his complaints sometime after April 4. According to Dupree, Meola read his letter as well as the warning letters. Meola then allegedly said to Dupree that there was nothing the Union could do because there was going to be a new owner in the building.

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On April 28, Dupree received another letter from Samaniego referring to an incident on Saturday, April 26, wherein Dupree did not escort the technician for lead testing. The letter asserts that Dupree had been told by Del Valle on Friday (April 25) to meet with the technician for lead testing at 10:00 a.m. in the lobby. The letter further asserts that when Samaniego asked Dupree why he was not available, he told Samaniego that he was in his apartment from 8:00 a.m. to 4:00 p.m., and that no one informed him that the technician had arrived. The letter chastises Dupree for not going to the lobby to find out where the technician was and if he needed Dupree's assistance. The letter adds that the technician was able to get into only 9 apartments on Saturday. The letter added that Respondent Del-Mar would like Dupree's cooperation in escorting the technician and getting him into all apartments, and that he should be available the next Saturday from 10:00 a.m. to 3:00 p.m.

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Dupree concedes that Del Valle had informed him that he needed to be present on

Saturday, March 18 for the lead testing. He claims why does he have to be there since Saturday is his day off and he was not needed for testing in occupied apartments. Del Valle insisted that Dupree had to be there. Thus, Dupree asserts that he was in his apartment from 8:00 a.m. to 4:00 p.m. but no one contacted him. Dupree also claims that at 4:00 p.m. he went downstairs and asked the security guard if the lead tester had come. Dupree asserts that the security guard informed him that the tester had arrived, told the security guard that he did not need Dupree and the tester was able to access the apartments without Dupree. Dupree further contends that Del Valle criticized him for not being there, and he explained to her that he was present and the security guard informed him that the tester said that Dupree was not needed.

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Dupree further asserts that Del Valle instructed him to be present the next Saturday at 10:00 a.m. in the lobby. He contends that he was there as instructed on that day, and that when the lead tester arrived at 12:45 p.m., he allegedly told Dupree that he did not need Dupree and that he did not know why Del-Mar had asked Dupree to be present for the testing of occupied apartments.

Dupree also testified that both Samaniego and Del Valle told him after he received the April 28 letter that the letter was "just a procedure."

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On the other hand, according to Samaniego and Metalios, it was essential for Dupree to be present when the tester was there, and that in fact, because of Dupree's absence, the testing did not take place, which necessitated the rescheduling of the appointment for the next week. Metalios learned on Monday, April 28 from the testing company that the tester had not been able to get into the building, and was informed by Samaniego that Dupree was not available to let the tester into the building.

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Samaniego conceded that the tester was due to work on occupied apartments, but nonetheless insists that it was necessary for Dupree to escort the tester since the tester was unfamiliar with the building and the apartments to be serviced were scattered. Samaniego confirmed Metalios' testimony that as a result of Dupree's absence on April 26, the testing did not take place, which necessitated a new appointment for the next week.

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After receiving this letter, Dupree again went to the Union, once more with a letter of complaint. This document states that "I am being harassed frequently by Del-Mar management. They have been threatening to fire me since they've taken over the site at 320 Sterling Street." The letter then repeated Dupree's prior complaints about the letters concerning the incident with the oil delivery and the alleged failure to notify Del-Mar of his whereabouts when he was in jail. Dupree added the lead testing incident, and set forth his version of events, i.e. that he was not needed.

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Dupree further asserts that he discussed these complaints with Meola. Meola, according to Dupree, informed Dupree on this occasion that he would look into Dupree's complaints and get back to him. Subsequently, Dupree contends that he made several follow-up phone calls and visits to the Union to find out what the Union had done about his complaints. Dupree contends that Meola would always say that he's "looking into" Dupree's complaints, but did not inform Dupree if and when he had spoken to anyone from management about Dupree's assertions.

⁸ The testing was to be done only in occupied apartments. The testing for unoccupied apartments had already been completed.

D. The Termination of and/or the Alleged Refusal to Hire the Discriminatees

Both Tribble and Dupree received identical letters, dated June 9, from Penda Aiken, who was, as noted, the payroll service for HPD. The letters read as follows:

This letter is to inform you that on or after June 28, 2008 HDP will no longer be the owner of 320 Sterling Street, Brooklyn, NY. As of the actual date of sale you will no longer be employed by the payroll service contractor retained by the Department of Housing Preservation and Development or assigned to 320 Sterling Street. If your apartment is a condition of your employment, you must vacate your apartment when your employment ends.

The new owner of the property will be the TIL II 320 Sterling HDFC. They are hiring Del-Mar Management Services as the property management company to continue with the overall management of the building. The new owner invites you to apply and interview for continued employment at 320 Sterling. If you are interested to schedule an interview, you must contact Del-Mar Management within two weeks from the date of this letter.

Should you have any questions, please call Del-Mar Management at 718-388-4365.

According to Tribble and Dupree, the letters were dated June 9. They did not receive them until June 20 when they were handed them by representatives from HPD along with their paychecks and were told to contact Del-Mar about obtaining applications. Dupree and Tribble assert that Dupree immediately called Samaniego to inquire about the applications.

According to Dupree, Samaniego promised to bring applications the next week but did not do so. Dupree also asserts that he made numerous calls to Samaniego asking for applications but did not receive them until July 24 when Del Valle brought applications to the building.

Samaniego recalled the conversation with Dupree but he claims that he told Dupree to come to Del-Mar's office in Williamsberg to pick-up the applications.

After receiving these letters, Tribble and Dupree went to the Union, and showed the letters to Meola. Meola told them that he did not know anything about the letters and he would look into it. Meola also informed the employees that they were not fired, so at that time, the Union could not do anything.

On July 11, before Tribble and Dupree had received applications for employment from Del Valle, they received termination letters. These letters, from Del-Mar and signed by Samaniego, informed the employees that as of July 10, Respondent UHAB became the new owner of the building and that their services will no longer be required as of August 13. Both employees were invited in the letters to apply and interview for continued employment at the building, and if they had questions to call Samaniego. Additionally, the letter to Dupree stated that the termination of his employment requires that he vacate his apartment on or before his termination date of August 13.

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Samaniego sent copies of these letters to the Union.

Tribble and Dupree went to the Union and spoke to Meola about these letters. Meola told the employees that they were not termination letters, and that the employees would have to reapply with Del-Mar.

On July 17, Samaniego asked Dupree to speak with him at the building. Samaniego informed Dupree that the new owners were going to be making changes at the building, and that Dupree was not going to be part of these changes. Samaniego stated that Respondents could offer Dupree some money to persuade him to vacate his apartment sooner rather than later. Samaniego added that he knew Dupree had a place in North or South Carolina, and offered to pay for Dupree's move to that place, plus three or four thousand dollars. Dupree rejected this offer and demanded \$150,000. Samaniego replied that this was an unreasonable request but that the Respondents' offer still stands.

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Dupree then asked what the issue was with him since he had been working in the building for eight years. Samaniego responded that complaints were made by tenants that Dupree did not do the work that tenants requested. Dupree answered that HPD had told him previously that he was supposed to be a supervisor in the building and that he shouldn't be doing the work himself.

The discussion then turned to whether the July 11 letter was a termination letter, with Dupree insisting that since he worked for HPD, HPD should be sending him a termination letter. Samaniego replied that HPD sold the building to a new owner. Dupree mentioned that the termination letter stated that the employees could submit applications to the new owner. Samaniego replied that he would get applications for Dupree as well as for Tribble.

On July 14, both Tribble and Dupree filed grievances at that Union asserting that they were "unjustly discharged effective August 13, 2008." The grievances list the employer as Penda Aiken.

Subsequent to these grievances being filed, Samaniego was contacted by Meola. They had several conversations about the grievances over a period of several weeks. During these discussions, Samaniego asserts that he told Meola that Respondents did not want Dupree to remain at the building because of job performance issues and Dupree's attitude. They talked about the warning letters that Dupree had received, and the fact that Dupree was disruptive at tenant meetings. Samaniego informed Meola that Respondents would be willing to hire Tribble if he was interested in staying. Meola informed Samaniego that it was "a package deal," i.e. that Tribble would not stay unless Dupree was hired.

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According to Samaniego, Meola proposed settlement amounts of \$10,000 for Dupree and \$8000 for Tribble. However, Respondents' officials rejected this amount and no agreement was reached.

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Tribble admitted that during the course of these negotiations between Meola and Respondents, Meola informed him that Respondents would retain Tribble but let Dupree go. Tribble responded to Meola that he (Tribble) did not want to be there. Tribble further admitted that he so informed Meola because he did not want to work under reduced wages, no benefits and starting as new man.⁹

⁹ Meola had informed Tribble that Respondents would be offering Tribble a job at reduced Continued

On July 24, Tribble and Dupree filled out the applications for employment for Respondents and submitted them to Del-Mar.¹⁰

According to Samaniego, when Tribble submitted his application, he and Tribble had a conversation. Samaniego asserts that he informed Tribble at that time that the people love him at the building and he is a hard worker. Samaniego claims that he asked Tribble if he was willing to come back. Tribble replied, according to Samaniego, that he would not come back unless Dupree is rehired. Tribble allegedly told Samaniego that "I can't do this unless Larry¹¹ is a part of this."

Tribble did not deny this conversation with Samaniego or that he told Samaniego that he would not come back unless Dupree is also hired. Tribble did insist however that he never actually received a job offer from anyone from Respondents, although he conceded that several representatives of Respondents asked him if he was interested in working for Respondents and encouraged him to apply.

In the latter regard, Del Valle testified that she had three conversations with Tribble after the transfer of ownership concerning his staying with the building. She testified that she asked Tribble if he was interested in working for Respondents because it was interested in hiring him, and that everyone in the building loved him. Tribble replied according to Del Valle that he couldn't do it. Tribble added that he would not accept a job without Dupree being hired as well. According to Del Valle, after she told Tribble that the tenants and Respondents want him there. Tribble replied "I can't do it, Casey. I can't work without Larry." Tribble, testified on rebuttal, conceded that Del Valle had informed him that Respondents wanted to keep him but insisted that this was not a job offer. Significantly, Tribble did not testify what his response was to Del Valle's comments. Thus, he did not deny Del Valle's testimony that he told her that he would not work for Respondents without Dupree.

Francisco Felix was hired by Respondents to replace Dupree as superintendent starting on July 11. Samaniego testified, and confirmed by Felix, that Samaniego asked Felix to inquire of Tribble if Tribble would be interested in working for Respondents as a porter. According to Felix, shortly after he began his employment, he asked Tribble if Tribble was going to stay. Felix asserts that Tribble responded "No, I'm not staying 'cause I'm going with Larry." Samaniego testified that Felix reported to him that he had asked Tribble about working for Respondents, and that Tribble had responded to Felix that Tribble "wouldn't come back."

Tribble denied that Felix had asked him about his interest in working for Respondents. According to Tribble, on his last day of work in early August, Felix approached him and told him that he was no longer working there and he could leave.

Metalios testified that she spoke to Tribble in July, either slightly before or after the July 11 transfer of ownership. Metalios told Tribble that we (Respondents) would like to keep him since he was very popular with the tenants. She noted that he hadn't yet submitted an application and she asked "what do you think?" Tribble replied "I don't think so – I don't know." Metalios continued that the tenants had encouraged her to make sure that he applies, and added that she hoped that he applies. She asked again "would you?" At that time, Tribble

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⁵⁰ To Dupree, under the section position desired, listed "superintendent/supervisor."

¹¹ Larry is how Dupree was referred to at the building.

looked in the direction of the stairs, where Dupree had just been and repeated, "I don't know - I don't think so." Metalios concluded the conversation by stating that there was still time and she hoped that he would reconsider.

Tribble essentially confirmed Metalios testimony in this regard. He admitted that Metalios had approached him and asked him about working for Respondents, and allegedly said that they (Respondents) might want to keep me. He recalled that he responded "No, I don't know" and walked away.

On August 4, Tribble and Dupree were summoned to see Samaniego in the office. They were handed money orders for their pay from 7/13/08 to 8/13/08. They were also asked by Samaniego and another individual from Respondent UHAB, whom they did not know, to sign a general release in order to receive the money orders. Dupree and Tribble refused to sign the release but did accept the money orders. Sometime later, they both received checks from Respondents for the two weeks pay that had previously been authorized by HPD and offered through the Union to compensate the employees for the extra work they performed after the prior porter died and was not replaced.

On August 7, Dupree filed the charge in the instant case. He also filed an 8(b)(1)(a) charge against the Union alleging a refusal to represent the employees. This charge was dismissed.

E. The Alleged Conversations between the Discriminatees and Representatives of Respondents concerning the Union and their Hiring

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Both Tribble and Dupree furnished testimony concerning alleged conversations that they had with Samaniego and Del Valle, in which they were told they would not be hired by Respondents because they were in the Union.

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According to Dupree, in January or February 2008, Samaniego approached him in the basement. On direct testimony, Dupree stated that Tribble was present. When asked by the undersigned about the conversation, Dupree testified "I don't think Roger was there." Dupree asserts that Samaniego asked him how much money he made. Dupree replied \$875 a week. Samaniego then allegedly asked if he was still in the Union. Dupree responded that he was in Local 32 BJ. Samaniego, according to Dupree, said that is the problem "we can't keep you because you make too much money and you're in the Union." Dupree claims that he responded "all the years I worked hard to get where I'm at today. I have bills to pay and I'm established in my life and now you're telling me because all of the hard work I did, you're going to take it away from me because I entered into a union?" Samaniego replied, according to Dupree, "it's not me – it's Del-Mar, I mean UHAB." Dupree claims further that he wrote down Dupree's salary on a piece of paper and walked away.

Tribble testified on direct examination to a conversation with Samaniego in July, where Samaniego allegedly said to him that he (Samaniego) would like to keep Tribble but he couldn't keep Tribble at his wages and the Union. Tribble asserted that no one else was present at this conversation.

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On cross examination, Tribble recalled a conversation with Samaniego in the basement in Dupree's presence, but Tribble did not recall the date. According to Tribble, Samaniego asked Dupree how much Dupree was making. According to Tribble, Samaniego then addressing both Tribble and Dupree, said that "they" were not going to keep them because they make too much money, and because they were in the Union. Tribble added that Samaniego

also said "they don't want union workers."

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While the alleged conversation with Samaniego did appear in Dupree's affidavit, the affidavit also stated that Dupree had included his version of the conversation in his April 4 letter to the Union. In fact, the April 4 letter to the Union makes no mention of any conversation with Samaniego, in which he allegedly told Dupree that he would not be hired because he was in the Union or any words to that effect. The letter did, as noted, complain about the warning notices issued to him and his assertion that Del-Mar was threatening his job and building a paper trail on him, but the letter did not attribute any of these actions as being motivated by Dupree's union membership. Further, this alleged conversation with Samaniego was not mentioned in Dupree's other written communication to the Union, where he complained about harassment by Del-Mar.¹²

While at one point in his testimony, Dupree stated that he orally told the Union about his conversation, he couldn't recall when and in what circumstances. When asked by the undersigned about that issue, he testified that he did not know whether he had told the Union about Samaniego's alleged statement to him that he (and Tribble) would not be hired by Respondents because of their union membership.

Furthermore, Dupree taped a conversation that he had with Meola on July 17 in order to build a record for his case. During that meeting, wherein Dupree complained to Meola about his treatment by Del-Mar, he made no mention that Samaniego or anyone from Respondents told him that he would not be hired because of the Union. He did mention during this conversation that a "manager," not further defined, told Dupree that "they" didn't want blacks working in the building. Meola advised Dupree to file a claim with Human Rights about that assertion.¹³

Dupree also testified that he had a conversation with Del Valle, with no one else present, sometime in March. Dupree asserts that Del Valle told him that "they" were not going to hire him because he was black, because he made too much money and because he was in the Union. Del Valle allegedly added that "Del-Mar, UHAB and HPD is [are] all in it together, so you've got a problem." Dupree testified that he was "speechless" after this alleged comment, so "I couldn't say anything."

Tribble testified on direct examination that three weeks before his employment ended, Del Valle told him that "they" couldn't keep Tribble because of "our pay and we're in the Union."

On cross examination, Tribble testified that Del Valle had numerous conversations with him, starting a couple of months after Del-Mar started managing the building.¹⁴ According to Tribble, Del Valle told him on each of these conversations that Del-Mar and UHAB were not going to keep him because he makes too much money and he was in the Union.

Tribble further testified that he accompanied Dupree to the Union on all of Dupree's visits to the Union when Dupree complained about the alleged mistreatment of Dupree as well as of Tribble. According to Tribble, he told the Union during their visits that Del Valle and Samaniego had informed him that he (and Dupree) were being gotten rid of because they were

¹² Interestingly, Dupree complained in that document that Del-Mar had been harassing him and threatening to fire him since they took over the site.

¹³ Indeed, both Tribble and Dupree filed charges at the New York State Division of Human Rights asserting that they were not hired because of racial discrimination.

¹⁴ As noted above, Respondent Del-Mar began managing the site in 2006.

union members.

Dupree's affidavit makes no mention of any conversation with Del Valle, where she mentioned to him that he would not be hired because he made too much money and because he was in the Union.

Dupree also did not include anything about this conversation during his taped conversations with Meola on July 17 nor in any of his other correspondences with the Union prior to his last day of work. However, after he was notified of the failure of Respondents to hire him, he wrote another letter to the Union dated August 4. In this letter, he first discussed an incident that allegedly occurred on May 16, where Del Valle had criticized Dupree and Tribble for leaving the building unattended because Dupree was needed for an emergency. Dupree adds further that when he returned to the building, he discovered that there was no emergency. Dupree asserts that this is another example of the harassment and prejudice against him. Dupree then asserts that Del Valle had said to him that "they did not want black Americans working for them or union workers working for them, and that they need to make or should I say build up a complaint background on us so that they can process this or use paperwork against me. She also explained to me that her company wanted to get rid of us because we belong to 32 B.J."

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Del Valle denied that she ever told either Dupree or Tribble that the owners did not want to hire them because they were black or because they made too much money, or because they were in the Union. She did testify however that Dupree complained to her on two or three occasions after Dupree started receiving the warning letters. According to Del Valle, Dupree said to her that they (HPD) were trying to get rid of him because he was making too much money and he was part of the Union. Del Valle claims that she replied that they can't get rid of him because he was part of the Union, and that no one can get rid of him if he does whatever he has to do.

30 F. The Emails

A number of emails between various officials of Respondents and HPD, referred to the hiring of Respondents' staff and contained some references to the Union. These emails are set forth below:

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From: Marina Metalios < Metalios@uhab.org Sent: Tuesday, 27 May 2008 17:19:10
To: "bberns@housingpartnership.com"

To: "bberns@housingpartnership.com"</br/>

To: "bberns@housingpartnership.com"</br>

Subject: FW: 10 27 08 – 10am Meeting 320 Sterling Street/

Super-Staff Issues

Tuesday – May 27th, 2008

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Beth-FYI. The meeting was productive (!!!) and we are all on the same page about the staff. HPD is fine w/ us writing the letter they'd sign saying that 100% of the employees will no longer be employed at 320 Sterling when HPD is not the owner and that in the case of the super, his unit is a condition of employment so must be surrendered.

We expect a fight, but this is a great move forward.

I must point out that HPD Legal in the form of Paul Schreiber sees

5	no way not to have the union at the building and I agree. I suggested that Romulo, you and I brainstorm the budget issues here, as we must anticipate the union will not give up the building. I am working on the termination letter w/ Romulo, as it must be sent outyesterdayMarina
10	From: Beth Burns [mail to:bberns@housingpartnership.com] Sent: Tuesday, May 27, 2008 7:43 PM To: Marina Metalios; Romulo Cc: Dan Martin Subject: RE: 10 27 08 – 10am Meeting 320 Sterling Street/ Super-Staff Issues
15	Please determine the union pay scale for same staff level previously budgeted vs non union for the same staff level. I recommend negotiating this prior to const/financing. Beth Berns Housing Partnership
20	From: Marina Metalios [mailto:Metalios@uhab.org] Sent: Wednesday, May 28, 2008 10:55 AM
25	To: Beth Berns; Romulo Cc: Dan Martin; Jeff Ewing Subject: RE: 10 27 08 – 10am Meeting 320 Sterling Street/ Super-Staff Issues
30	Beth and Romulo I agree and said to Romulo yesterday that we need to recognize that the union is likely unavoidable at Sterling and need to reproject. Romulo has a very good sense of this from my witnessing him do a fast-and-dirty analysis yesterday at the meeting. Can you Romulo give us the two scenarios?
35	Also, HPD Office of Legal Affairs brought up an interesting twist, jumping off my "we can get rid of individual staff but not get rid of the union." As the new employer, our joint venture will have the opportunity to set the initial terms of employment. This gives us some flexibility and one scenario might be that Larry re-applies
40	and we don't hire him; Roger the beloved porter applies and we make him the super. We give Roger Larry's salary via his promotion and the porter who is hired to replace Roger gets a lower salary than Roger currently earns. Your thoughts? Marina
45	From: Beth Burns [bberns@housingpartnership.com] Sent: Wednesday, May 28, 2008 6:07 PM To: Marina Metalios; Romulo

Dan Martin; Jeff Ewing

Super-Staff Issues

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Subject: RE: 10 27 08 – 10am Meeting 320 Sterling Street/

What are the union pay scales? What are the non-union?

Thanks, Beth Berns

From: Romulo [mailto:Romulo@delmarmgmt.com]

Sent: Friday, July 11, 2008 2:50 PM

To: Marina Metalios

10 Subject:

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Marina: Try this one, Romulo

Romulo E. Samaniego

Del-Mar Management Services, Inc.

From: Marina Metalios [mailto:Metalios@uhab.org]

Sent: Friday, July 11, 2008 2:57 PM

To: Romulo

Cc: bberns@housingpartnership.com

Subject: FW:

Romulo—that one I was able to open. When do we invite him to

re-apply? If we do not in this letter, let it rip.

Beth—FYI this is part of the drama of trying to get rid of the super that HPD might have thwarted as you saw from the earlier emails

today.

30 --Marina

Project Manager

UHAB

From: Romulo [mailto:Romulo@delmarmgmt.com]

Sent: Friday, July 11, 2008 3:17 PM

To: Marina Metalios

Subject: RE:

Marina: I omitted the letting him reapply because the letter is basically terminating his employment and then I am telling him to reapply. Where is the logic? Although the City letter said that they could reapply. I guess I can add the reapply language if you agree. Otherwise. I will send it to him as is and another one to

Roger.

From: Romulo [mailto:Romulo@delmarmgmt.com]

Sent: Friday, July 11, 2008 4:43 PM

To: Marina Metalios

Subject: RE:

The updated termination letters:

	Del- Mar Management Services Inc.
5	From: Marina Metalios <metalios@uhab.org> Sent: Fri, 11 July 2008 16:46:49 -0400 To: Romulo<romulo@delmarmgmt.com> Subject: RE:</romulo@delmarmgmt.com></metalios@uhab.org>
10	Great. Romulo—when are you flyering the "dear tenant" letter? It is almost 5PM. Should I meet you? This can't all be happening from
15	your BlackberryMarina Project Manager UHAB
20	From: romulo@delmarmgmt.com [romulo@delmarmgmt.com] Sent: Friday, July 11, 2008 4:52 PM To: Marina Metalios Subject: Re:
25	I am in the office. The tenant letters are ready. The staff letter is ready now and I am about to deliver. Thank you, Romulo
30	From: Fridel, Olga Sent: Tuesday, July 22, 2008 11:38 AM To: Rosario Jr, Juan Subject: 320 Sterling St – Super/Port Salary
35	Hi Juan, Hope all is well! Can you please let me know what exactly the super and porter's salary is at 320? HPD is officially not their employer any longer. The management office gave them both a 30 day notice and will both be officially to registed an 8/42/08. (They would like to pay
40	both be officially terminated on 8/13/08. (They would like to pay them for the work they are doing now.)
45	Thanks, Olga Fridel, Project Manager Division of Alternative Management Programs – Special Projects NYC Department of Housing Preservation and Development
50	From: Rosario Jr, Juan Sent: Tuesday, July 22, 2008 11:57 AM To: Fridel, Olga Subject: RE: 320 Sterling St – Super/Port Salary

Hi,

The monthly salary for Mr. Dupree is \$3,784.81 per month which is divided by 4.33 which makes his weekly salary \$874.09. In the case of Mr. Tribble he is paid at the porter rate of \$3193.81 per month divided by 4.33 which makes his weekly salary \$737.60

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From: Romulo [mailto:Romulo@delmarmgmt.com]

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Sent: Monday, July 28, 2008 12:14 PM

Marina Metalios

To:

Cc: ellisd@delvallecpa.com; Gladys Torres; Romulo

Subject:

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Hello Marina – We need to get workers comp insurance for 320 Sterling Street ASAP. So either UHAB needs to get the insurance, or DelMar needs authorization from UHAB for DelMar to proceed to obtain workers comp insurance for the building. Please advise as how you would like us to proceed.

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Also, Dennis (Larry) Dupree the super and Roger Tribble the porter were paid by HPD/Penda Aiken through 7/12/08. I contacted Penda Aiken to confirm that this would be the last paycheck that they would be getting from HPD/Penda Aiken. Therefore, we need to pay them for the period from 7/13/08 through 8/13/08 as stated in the letter, this approximately 4.5 weeks of salary, in dollar terms \$3,933.41 for Larry and \$3,319.20 for Roger.

Due to the super and the porter's absenteeism and unwillingness to cooperate, (neither super nor porter were in the building today) we intend to terminate them by this Friday, August 1st, but pay them through 8/13 as indicated in the letter, and change locks for the basement and put a temporary super and porter in place.

I am writing this on behalf of Romulo and after speaking with him.

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Romulo E. Samaniego Del-Mar Management Service Inc.

- Romulo's assistant Daniel

From: Marina Metalios [mailto:Metalios@uhab.org]

Sent: Mon 7/28/2008 1:29 PM

To: Romulo

ellisd@delvallecpa.com; Gladys Torres; Beth Berns Cc:

Subject: RE:

Romulo—

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Several issues. First, Carlecia's email talks about "June 18th" as when our payroll should begin, but she meant "July" as we've cleared up. So, why are we not using that date instead of the one below?

Second, please get the worker's comp on behalf of the JV. Third, I am happy to have the super gone but do not think the building will welcome the loss of Roger. Where are we with him? What are we doing to give him incentive to re-apply? Also, where are we with the Union? Finally, what is the plan to get Larry's apt. back, whenever the termination/departure/whatever plan is stated? I remember you working some pretty sophisticated negotiation to get him to leave quickly and peaceably. Where are we with that?

--Marina

Project Manager

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From: Romulo [romulo@delmarmgmt.com]

Sent: Monday, July 28, 2008 11:23 PM

To: Marina Metalios

Cc: <u>ellisd@delvallecpa.com</u>; Gladys Torres; Beth Berns

Subject: RE:

Hi Marina: 1) Carlecia's June/July 18 date assumed that HPD would pay for an additional 5 business days. The Carlecia or HPD's legal dept said that HPD will not pay anything after the closing date.

2) ok on workers comp, we will get it.

3) the supt departure is in process (sans union).

Thank you, Romulo

G. Respondents' Evidence Concerning its Hiring Decisions

Respondents presented several witnesses, who testified concerning alleged work deficiencies in Dupree's work performance, which allegedly motivated its decision not to hire him. These witnesses included Metalios, one of the individuals involved in Respondents' decision not to offer Dupree a position.

According to Metalios, in April and May 2008, she had discussions with Olga Fridel and Carlecia Taylor, officials of HPD at various meetings. She testified that Taylor and Fridel informed her that HPD had received numerous complaints from tenants about Dupree's performance. They recommended that Dupree not be retained as superintendent when Respondent UAB became the owner of the cooperative. Fridel specifically said with regard to Dupree, "No, you don't want to keep him." The complaints that were discussed included that tenants could not reach Dupree, that Dupree was not responsive and that when tenants asked him to do work, he would say "that's not my job." Metalios also testified that there were several tenant representatives present at these meetings, including Marjorie McCarthy (president of the tenants' association), Carol Kelly Campbell, David Campbell (no relation to Carol Campbell) and Maureen Dixon. They corroborated the complaints made by Fridel and Taylor about Dupree's performance and also recommended that Dupree not be hired by the joint venture.

Metalios further testified that at these meetings there was a discussion about terminating Dupree for cause while Dupree was still employed by HPD and prior to the transfer. While HPD

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did not want Dupree to remain as superintendent, ultimately Taylor and Fridel told Metalios that since the conversion was imminent, HPD preferred not to terminate Dupree for cause, and to let Respondents make the decision.

The decision not to retain Dupree was made in discussion between Berns and Metalios in May. They decided that Dupree would not be hired, even if he applied.¹⁵

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Metalios also testified that she had spoken to Samaniego about Dupree's performance, and that Samaniego had confirmed these complaints about Dupree's work, mentioned to Metalios that Dupree had been reprimanded and written up several times and recommended that Dupree not be retained.

Metalios also furnished testimony about an incident that occurred on July 11, the day of the conversion, which was also the day that Dupree received his "termination" letter. There was a tenants meeting celebrating the conversion, which was attended by Congresswoman Yvette Clark. Dupree attended the meeting, and according to Metalios, became abusive using profanity to protest his treatment by Respondent UHAB. Metalios asserts that she got close to Dupree on that evening and smelled alcohol on Dupree's breath.¹⁶

Corroborative testimony concerning Dupree's work performance was received from McCarthy, Samaniego and Del Valle. McCarthy testified that she received numerous complaints from tenants that Dupree was not around when he was needed and that he would refuse to perform work saying it was not his job. McCarthy also testified that she herself had asked Dupree to perform jobs, and he would tell her that it was not his job. McCarthy also testified that the tenants frequently asked her why Dupree was still employed and that she relayed these complaints to HPD representatives as far back as 2006. She asked Carol Dixon, an official of HPD, about Dupree's assertion that it was not his job to do certain work, and she told Metalios that Dixon replied that she was hearing these complaints from others and was tired of it. When asked by McCarthy why HPD did not fire Dupree, Dixon replied that Dupree was in the Union and it was not so easy to fire him.

In 2007, after Respondents became involved in the building, McCarthy complained to Ann Marie Henderson, another HPD representative, about Dupree and stated that he should not remain as superintendent once the building goes co-op. McCarthy added that she would love to have a superintendent, who would take care of the building and tenants. Henderson responded that when the transition takes place "you all" will be able to choose a person, who they want to be the superintendent.

McCarthy also complained to Samaniego after Del-Mar took over managing the building that tenants were complaining about Dupree, and asked Samaniego to take care of it. In 2008, McCarthy told Samaniego that the tenants felt that Dupree should not be hired when the transition occurs. Samaniego replied that "we'll take care of that in due course."

Samaniego confirmed the testimony of Metalios and McCarthy that Dupree was frequently not available to perform work and that he would tell Samaniego that he was a "supervisory" super. Further, Samaniego testified that he received complaints from tenants that

¹⁵ HPD and Respondents had decided that HPD would send a letter to Dupree (and Tribble) notifying them of the new ownership and inviting them to apply.

¹⁶ Metalios conceded that the decision not to retain Dupree was made before this incident, but asserts that Dupree's conduct there confirmed Respondents' decision not to hire him.

they didn't want Dupree in their apartments and that Dupree was either unwilling or unable to make requested repairs.

Samaniego further testified that he received complaints from Zoolie Rolan (Metalios predecessor at Respondent UHAB) about Dupree's performance, including the fuel delivery incident, and that she recommended that they write Dupree up for his conduct during that day. An HPD representative suggested to Samaniego that he write up Dupree for the lead testing incident, but Samaniego couldn't recall who from HPD had done so.

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Samaniego testified that Dupree would frequently tell him that he was supposed to be a "supervisory" super, and that he (Dupree) had been told by HPD that he didn't have to do work, such as helping out with garbage, mopping¹⁷ and cleaning up. Samaniego did not believe this to be true but he decided to check out what Dupree had informed him with HPD. He first asked Fridel sometime in 2007 about what Dupree had told him. She replied that it didn't sound right, but she would find out who would know. Fridel referred Samaniego to Juan Rosario, a higher official at HPD. Samaniego told Rosario what Dupree had said was told to him by HPD. Rosario responded that "it's bullshit" and instructed Samaniego to write Dupree up. Samaniego relayed what Rosario had informed him, and Dupree continued to insist that HPD had told him that he was a "supervisory" super.¹⁸

Samaniego further testified that in April 2008, Rosario instructed him to start a paper trail on Dupree and write him up. This was after a meeting in which HPD representatives had expressed dissatisfaction with Dupree's performance.

Samaniego also recalled a meeting sometime in April when it was unanimously decided not to hire Dupree when the joint venture takes over because Dupree was not around and his job performance was not good. According to Samaniego, he expressed his agreement with this position, which was also recommended by Taylor and Fridel of HPD and Metalios and Rolan of Respondent UHAB. Samaniego also mentioned at this meeting that Dupree still considered himself a "supervisory" super and would not perform certain work because they were not his job.

Finally, Del Valle, who was at the building most frequently, confirmed the testimony of the other witnesses that Dupree was frequently not available, would either refuse to or was unable to do work and would state that it is not his job. She would observe these incidents or she would receive complaints from tenants about them. She testified about specific complaints from several tenants about Dupree's poor performance, including the failure to fix a leak, failure to install a medicine cabinet and the failure to fix a radiator valve. When Del Valle confronted Dupree concerning the latter complaint, Dupree referred to the tenant as "a nagging bitch."

Del Valle also recounted several complaints from tenant Joyce Stewart about Dupree's failure to clean up a platform, which allegedly resulted in her son, who has asthma, having breathing problems. Stewart reported to Del Valle that she had told Dupree ten times to clean it, and he did not do so, and that she (Del Valle) had to tell Dupree to do this job herself.

^{45 17} Samaniego had mentioned to Dupree that the elevators smelled of urine and told Dupree to mop it up. Dupree said that it was the porter's job to mop, and the tenants are pigs and they urinate all over the place. Samaniego told Dupree that he must mop, if necessary. Dupree nodded his head "okay" but continued to tell Samaniego the HPD had told him that he did not have to do this work.

¹⁸ Dupree admitted that he told Samaniego that HPD had informed him that he was supposed to be supervisor and not to perform certain work.

According to Del Valle, Stewart commented to her about Dupree as follows; "He's a lazy ass, who doesn't do any work."

Del Valle also confirmed Samaniego's testimony about Dupree asserting that he's a "supervisory" super and his refusal to perform certain work. She recalled at least six times that Dupree said this to her. She furnished some examples of tasks that Dupree claimed was not his job. They included hanging light bulbs, taking out the trash, mopping and cleaning the elevator. He would tell Del Valle that these weren't his responsibilities; he was there to supervise. She would tell him that this was his job and he must do it. She added that Tribble helps him out so he should help Tribble out. Dupree would not actually refuse to perform these jobs but would constantly tell Del Valle that it wasn't his job. According to Del Valle, he would simply not do these jobs when they were needed. When Del Valle confronted him with the fact that there was urine in the elevator, he replied that "they" just peed in the elevator just before Del Valle arrived.

In this regard, Del Valle further testified that shortly after the other porter died and was not replaced, she encountered Tribble. At that time, Tribble complained to her that he was doing all the "fucking work." She asked where Dupree was, and Tribble replied that Dupree was in his apartment.

Del Valle also asserted that she informed Samaniego that in her opinion, Dupree should not be retained by Respondents because he (Dupree) doesn't work and Tribble does all the work. She also recalled another incident, sometime in March or April, when there was a leak in the building and she could not find Dupree. She was able to reach Tribble, who was at home, and he came to the building and was able to find Dupree. When Dupree called Del Valle, he told her that there was a leak, and she asked if the water was still running. He said yes. She instructed him to turn off the water, and asserts that it is common sense to do so and that Dupree should have known to do it himself.

Del Valle also testified about conversations that she had with Rosario of HPD, similar to Samaniego's testimony concerning Dupree's assertion to her that his job was only to supervise, and not to do porter's work. She testified that she had never heard of a superintendent just being a supervisor. Rosario confirmed that Dupree was supposed to help out and perform work, and Rosario added that in his view, Dupree was "a lazy bastard and he didn't work."

All of the Respondents' witnesses testified that HPD, the tenants and Respondents' officials all believed that Tribble was an excellent worker and that he should be retained by the Respondents when it takes over the operation of the building. Indeed, at some point in the deliberations, there was a discussion of offering Tribble the superintendent's position. However, this offer was never made to Tribble because he did not file an application until July 24, after a new superintendent had been hired. Moreover, Del Valle, Metalios and Samaniego as well as the replacement for Dupree, Francisco Felix, encouraged Tribble to apply for a job as a porter. Tribble's response was at the time equivocal and at other times, as related above, he would tell Respondents' officials, such as Samaniego and Del Valle, that he would not agree to work for Respondents unless Dupree was hired as well. Indeed, Del Valle testified that Tribble told her on three occasions that he could not work for Respondents without Dupree.

Further, as I have also related above, Tribble admitted telling Meola that he would not work for Respondents unless Dupree was hired as well, and Samaniego testified that Meola

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was informed of Tribble's position in that regard. 19

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Finally, Metalios testified that the union affiliation of the employees had no bearing on Respondents' decision not to hire Dupree and Tribble. She asserts that she and Respondents' other representatives were aware that the employees had been represented by the Union while they were employed by HPD. Further, HPD Legal had informed Respondents that it would be required to recognize the Union, but that it was not required to pay union wages or benefits. Thus, while she conceded that Respondents could not afford to pay union wages or benefits, this did not influence the hiring decisions since it knew that it could set its own terms of employment. Thus, the hiring of either employee would not obligate it to pay union rates or benefits.

According to Metalios, Respondents did not hire Dupree because of his poor performance and complaints from tenants. As for Tribble, Respondents wanted to hire him but did not do so because he informed Respondents that he would not work for it without Dupree.

III. Credibility Resolutions and Analysis

This case presents a number of significant credibility issues, the most important of which is the testimony of Dupree and Tribble that they were told by Samaniego and Del Valle that Respondents did not intend to hire them because they made too much money and because they were in the Union.

Based upon comparative demeanor considerations, as well as other factors detailed below, I do not credit the testimony of either Dupree or Tribble concerning these alleged conversations. First and foremost, I rely upon the failure of Dupree (or Tribble) to mention these alleged conversations to the Union during their numerous discussions with Meola or in Dupree's pre-termination letters to the Union complaining about his treatment. Notably, in these letters, as well as in Dupree's oral complaints to the Union, Dupree was complaining about being "set-up" by Del-Mar and HPD by among things, the three warning letters issued to him in March and April. Yet, there was no mention of these alleged statements made by Samaniego or Del Valle to either Dupree or Tribble. I find it inconceivable that Dupree would fail to mention these assertions to the Union had they in fact occurred. Further, Dupree tape recorded conversations that he made with Meola and Samaniego in an attempt to build a record for his case, and in neither of these conversations did Dupree mention his assertion that Samaniego and/or Del Valle had told him and Tribble that they were not being hired because they were in the Union. I note also that Dupree in his letters to the Union, as well as in his testimony herein, stated that Del-Mar was "harassing" him and threatening his job since it began managing the building. That was sometime in 2006, well before the alleged statements were made to him about the Union.

Moreover, Dupree's testimony was not consistent on direct and cross examinations on these issues. He testified on direct examination that Tribble was present during his January or February conversation with Samaniego. When asked by the undersigned about the conversation, Dupree stated "I don't think Roger was there." Tribble testified on direct examination about a similar conversation in July with Samaniego but asserted that no one else was present. However, on cross examination, Tribble suddenly recalled being present at a conversation between Samaniego and Dupree where Samaniego allegedly said "they" were not going to keep us because they were in the Union. Tribble embellished further by asserting that

¹⁹ Meola did not testify herein.

Samaniego also said that they "don't want union workers," an alleged statement that Dupree did not mention.

Further, Dupree's affidavit stated clearly that he included his version of the alleged conversation with Samaniego in his April 4 letter to the Union, while in fact the letter made no such references.

While at one point in his testimony, Dupree asserted that he orally told the Union about these conversations, I do not credit such testimony. Dupree could not recall when and in what circumstances he so informed the Union. More significantly, when asked by the undersigned about this issue, Dupree testified that he did not know whether he told the Union about Samaniego's alleged comments.

Dupree also testified about a similar conversation with Del Valle in March, where she allegedly told him that he would not be hired because he made too much money, because he was in the Union and because he was black. Dupree did not include this alleged conversation in his affidavit.

Tribble testified on direct examination that Del Valle told him three weeks before his employment ended that he and Dupree wouldn't be kept because of "our pay and we're in the Union." Once more, Tribble embellished this testimony on cross examination by asserting that Del Valle had numerous conversations beginning in 2006, where Del Valle allegedly told him that he would not be kept because he makes too much money and he was in the Union. While Tribble also testified that he told the Union orally about the alleged statements to him by Samaniego and Del Valle concerning not being hired because he was in the Union, I do not credit Tribble in that regard. Notably, his affidavit contains no mention that he so informed the Union about these alleged conversations, and his testimony that he told the Board agent about these discussions and she failed to include them in his affidavit reflects poorly on his credibility in general.

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I again emphasize the failure of Dupree to mention these alleged statements to the Union in his taped conversation with the Union as significant evidence that these conversations did not occur. Dupree was trying to build a record for his case, as well as trying to convince the Union to take action on his complaints that he was being "set up" as a prelude to termination. It is logical to assume that had such statements been made to Dupree (that he was being set up because he was in the Union) that he would have mentioned it to the Union in that conversation as well as his prior written correspondences to the Union.

Conversely, I found the denials of Samaniego and Del Valle, as well as their testimony in general to be credible and believable. I note that Samaniego's denials are consistent with Respondents' emails, which were introduced by General Counsel. There, it is clear and consistent with Samaniego's testimony that Samaniego and Respondents were not aware of the salaries of Dupree and Tribble, and needed and obtained that information from HPD in the spring of 2008. Thus, if as Dupree and Tribble had testified, Samaniego asked about and wrote down Dupree's salary in January or February 2008 as a prelude to the alleged statements concerning their hire, he would not have needed to request that information from HPD.

Further, I found Del Valle to be the most credible witness during the entire hearing. Notably, she was no longer employed by Respondents during the trial, so she was a neutral witness with no reason not to testify truthfully. I found her testimony to be detailed, consistent and candid. Further, she admitted that the subject of the Union did come up in discussions with Dupree, but that Dupree had brought up the subject. I find this testimony to be believable and I

credit it. It is likely that such comments were made by Tribble and Dupree to Samaniego, as well as to Del Valle. I believe that it was Dupree and Tribble, who were concerned (correctly) that the Respondents would not agree to pay them union wages, and they therefore transposed that concern to a belief that Respondents might not want them to be in the Union. However, this belief of Dupree and Tribble was not accurate as confirmed by the emails and the testimony of Metalios. Respondents were aware that they were not obligated to pay union rates even if they recognized the Union. Therefore, there would be no reason for either Samaniego or Del Valle to inform employees that they would not be hired because they were in the Union.

In view of these credibility findings, *vis a vis* Dupree, Tribble, Del Valle and Samaniego, there is not much left of General Counsel's case. It is necessary for General Counsel to establish the Respondents' failure to hire Dupree and Tribble was motivated by anti-union animus. *Planned Building Services (PBS)*, 347 NLRB 670, 673 (2006). In my view, General Counsel has failed to meet its burden of proof in this regard.

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Absent the alleged statements by Samaniego and Del Valle to Tribble and Dupree, there is no evidence of any animus towards the employees because of their union membership or their union activities.

In the latter regard, General Counsel argues that Dupree and Tribble filed grievances with the Union in March 2008 with HPD²⁰ concerning the failure to hire an additional porter after the previous porter died. Notably, there was no evidence presented by General Counsel that Respondents were aware of these grievances. Both Samaniego and Metalios credibly denied being aware of these grievances, and the record indicates that the negotiations concerning the grievances were conducted between HPD and the Union.

Further, Dupree also filed grievances with the Union concerning his warning letters, but again there is no evidence in the record that Respondents became aware of these grievances.

More importantly, even if somehow, knowledge of these grievances can be imputed to Respondents, the record is barren of any evidence of Respondents' animus or antagonism towards the employees for the filing of these grievances.

General Counsel places substantial reliance on the emails between representatives of Respondents in the spring and early summer, which in General Counsel's view, establish Respondents' animus towards the Union and that Respondents failed to hire Dupree and Tribble because they were union members. I do not agree.

General Counsel contends that these emails establish that Respondents were interested in avoiding the perceived increased costs of union representation, and that therefore they decided not to hire the employees because they believed that hiring them would increase their costs.

However, I find that the emails do not support these assertions. Rather, to the contrary, the emails support the credible testimony of Respondents' witnesses that although it was admittedly concerned about the increased costs of paying union rates and benefits, it was not worried that hiring Dupree or Tribble would result in their being obligated to pay these wages

While the grievances were filed against Penda Aiken, that entity was merely the payroll company, which issued checks on behalf of HPD—the actual employer of the employees at the time.

and benefits. Thus, Respondents had been advised by Counsel for HPD that the Union would have to be recognized by the new ownership, but that it would be free to set their own terms and conditions of employment. Thus, Respondents were not concerned that the hiring of the employees would or could lead to increased costs since it was aware that it could set its own wages and benefits when hiring employees. Thus, the union membership or lack thereof of the employees had no bearing on the Respondents' budget consideration or their hiring decisions.

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General Counsel points specifically to the email of July 28 from Samaniego to Metalios, which states "the supt departure is in process (sans union)." In General Counsel's view, this email proves that "it was in the context of wanting to avoid the Union that Respondents ended Dupree and Tribble's employment." However, in my view, this email is too ambiguous to permit such a finding. Further, that conclusion is inconsistent with the other emails on previous dates, where it is clear that Respondents knew and had acquiesced in recognizing the Union, but believed correctly that such recognition did not require paying union rates and benefits. The comment made by Samaniego was in response to Metalios' prior email requesting an update on the status of Samaniego's attempt to persuade Dupree to leave his apartment "quickly and peaceably." Samaniego's response appears to relate to that effort, and Samaniego's comment that Dupree's departure was in process (sans union) could just as easily refer to the fact that the Union was no longer involved in the negotiations to persuade Dupree to leave his apartment. In this regard, the record establishes that Samaniego had attempted to negotiate a buyout for both Tribble and Dupree but that effort was unsuccessful. Apparently, Samaniego was still attempting to negotiate a separate buyout directly with Dupree, which would include Dupree leaving his apartment as part of the deal. I therefore place little reliance on that email.

General Counsel also relies on other emails reflecting that HPD sees no way to get rid of the Union, and that we must anticipate that the Union will not give up the building. These comments may reflect that at some point, Respondents thought about avoiding the Union. However, by May 2008, prior to the notifications to the employees of their terminations with the opportunity to apply, Respondents knew that the Union could not be avoided, but also knew that it could set its own terms and conditions of employment.

General Counsel also relies on the July 11 email from Metalios to Berns, where she states "FYI, this is part of the drama of trying to get rid of the super that HPD might have thwarted as you saw in earlier emails today." This statement is also too ambiguous to establish what General Counsel asserts that "HPD valued Dupree's work as a superintendent." Rather, it appears that it refers to the letters sent by HPD and Respondents inviting the employees to apply for the jobs with Respondents. They had some discussion in earlier emails about why this was necessary in the case of Dupree, who it already been decided would not be hired even if he applied. It seems that HPD had insisted that the letters, even to Dupree, provide that opportunity.

The credited evidence described above establishes that Respondents and HPD had been dissatisfied with Dupree's performance for some time, and had discussed whether to terminate him while he was still employed by HPD. Indeed, in that regard, Rosario and Zoolie Rolan had instructed Samaniego to write up Dupree in order to build a record to fire him. However, HPD ultimately decided not to terminate Dupree while he was still its employee, in part because the transition was imminent, and it was concluded that Respondents should implement the decision not to retain Dupree by not hiring him.

It is true that the record evidence suggests the HPD's decision not to terminate Dupree while he was still their employee was also motivated in part by the fact the Union was still Dupree's representative at the time, and HPD appeared to believe that a sufficient record had

not built up at the time to satisfy the Union. However, that finding is of no help to General Counsel. It establishes only the Dupree's union membership saved him from being terminated earlier by HPD, not that the decision by Respondents not to hire him was motivated by union membership.

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I also note that Respondents have voluntarily recognized the Union as the representative of its employees, and that it conducted several bargaining sessions with the Union over terms of a new contract. This distinguishes the instant case from *PBS*, *supra* and other cases²¹ involving refusals to hire in a successorship context, where the employer refuses to hire employees in order to avoid having to recognize the union.

Accordingly, based on the above credibility resolutions and analysis, I conclude the General Counsel has failed to meet its burden of proof that the refusal to hire either Dupree or Tribble was motivated by union animus. *Dalton Roofing Service*, 344 NLRB 870, 871-2 (2005) (No direct evidence of anti-union animus); See also *Ken Maddox Heating and Air Conditioning*, 340 NLRB 43, 46 (2003).

Moreover, even if I were to conclude, which I do not, that the emails or other evidence establish that anti-union animus contributed to Respondents' decision not to hire the discriminatees, I find that Respondents have met their burden of establishing that they would have taken the same action absent their union activities. In the regard, I find the mutually corroborative, consistent and credible testimony of Metalios, Samaniego, McCarthy and Del Valle establishes that HPD and Respondents were dissatisfied with Dupree's performance for several reasons, particularly numerous complaints from tenants that Dupree was difficult to find. and was often unable to or unwilling to perform certain jobs. I note in this respect Dupree's admissions that he had taken the position that he was a "supervising" superintendent and that certain jobs were not his work. I note particularly the credible testimony of Del Valle, who as related above was no longer employed by Respondents. Her testimony was detailed, consistent and believable concerning complaints made by tenants to her about Dupree. Further, her testimony about exact quotes from a tenant that Dupree was a "lazy ass, who doesn't do any work" and from Rosario of HPD, who characterized Dupree as "lazy bastard, who didn't work" was most compelling and believable and not likely to be fabricated. I also find as I have outlined above that HPD had recommended to Respondents that Dupree not be retained when the new ownership takes over. Indeed, I conclude that HPD was considering terminating Dupree itself prior to the transition, but ultimately decided to leave the decision to Respondents.

As to Tribble, the evidence overwhelmingly establishes that Respondents were desirous of retaining Tribble since he was very popular with the tenants, and Respondent viewed Tribble as an employee, who was a diligent worker. Indeed, at one point, Respondents' officials had discussed offering Tribble the job of superintendent. The evidence reveals that Metalios, Del Valle, Samaniego and even Felix, the superintendent hired to replace Dupree, encouraged Tribble to apply. However, Tribble consistently made either vague or equivocal responses to the requests, or in the case of discussions with Del Valle and Samaniego, said specifically that he would not work for Respondents without Dupree being hired as well.

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I recognize that Tribble did file an application for employment with Respondent on July 24, and as General Counsel correctly points out, Respondents did not make a specific or firm offer of employment to Tribble even after he filed that application. However, I credit

⁵⁰ 21 State Distributing Co., 282 NLRB 1048 (1987); Love's Barbeque Restaurant, 245 NLRB 78, 82 (1979), enfd. in part 640 F.2d 1094 (9th Cir. 1981).

Samaniego's testimony that when Tribble filed his application, they had a conversation during which he informed Tribble that the people at the building loved him and that he asked Tribble if he was willing to come back. Tribble replied that he would not come back unless Dupree is rehired. Tribble added "I can't do this unless Larry is a part of this."²²

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Furthermore, Tribble also admitted telling Meola that he was not interested in working for Respondents at reduced wages. More importantly, Samaniego, who was negotiating with Meola on behalf of both Tribble and Dupree, told Meola that Respondents did not want Dupree to remain at the building because of performance issues and attitude, but Respondents would be willing to hire Tribble if he was interested in staying. Meola responded to Samaniego that it was a "package deal," i.e. that Tribble would not stay unless Dupree was hired as well.

Therefore, in these circumstances, I conclude that Respondents have shown that it did not hire Tribble because it believed that Tribble would not accept employment unless Dupree was also hired, and that Respondents were not interested in such a "package deal."

Accordingly, I conclude that even if a *prima facie* showing was found, that Respondents have met their rebuttal burden of proving that it would have taken the same action, i.e. not hiring the employees, absent their union membership or activities.

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I therefore recommend that the complaint be dismissed.

Based upon the above findings of fact and conclusions of law and on the entire record, I issue the following recommended:

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Order²³

The complaint is dismissed in its entirety.

30 Dated, Washington, D.C., September 24, 2009

Steven Fish

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Administrative Law Judge

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²² I note that Tribble did not deny making the above comments to Samaniego.

²³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.